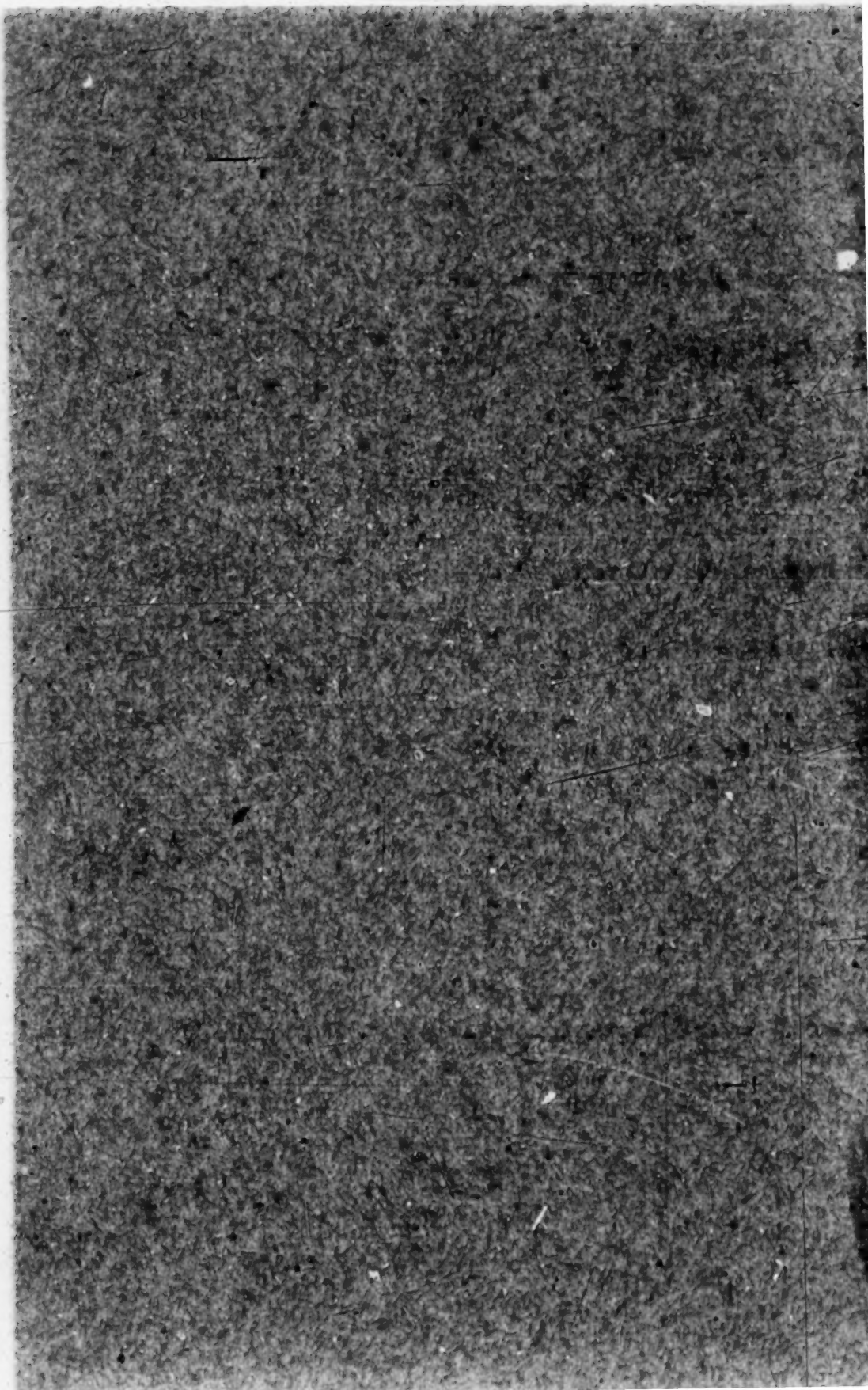

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No. 503

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

GRAND RIVER DAM AUTHORITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions presented	6
Statement	6
Summary of argument	12
Argument:	
I. There was no taking of property of respondent for which it has not been paid	17
A. The United States has directly exercised federal prerogatives conferred by the commerce power. It is not required to pay compensation because it has followed that course in lieu of granting a license to a state instrumentality	18
B. Settled principles of eminent domain law bar a recovery in this case	29
II. Respondent has not proved ownership by the state of Oklahoma of all the waters within its borders	35
A. The Court of Claims' theory of ownership by the State is plainly erroneous	37
B. The Authority has not shown State ownership of the waters used by the Federal Government's dam	39
Conclusion	46
Appendix	47

CITATIONS

Cases:	
Arizona v. *California*, No. 9, Original	36
Baker v. *Ellis*, 292 P. 2d 1037	39
Bowles v. *Willingham*, 321 U.S. 503	29
Dartmouth College v. *Woodward*, 4 Wheat 518	34
Euclid v. *Ambler Co.*, 272 U.S. 365	29

Cases—Continued

Page

Federal Power Commission v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 45
Federal Power Commission v. *Oregon*, 349 U.S. 435 ..... 16, 38, 40, 43
Frost v. *Corporation Commission*, 278 U.S. 515 33
Grand River Dam Authority v. *Federal Power Com'n*, 246 F. 2d 453 11
Grand River Dam Authority v. *Grand-Hydro*, 335 U.S. 359 ..... 7, 8, 14, 19, 22, 23, 24, 25, 26
Hamilton v. *Kentucky Distilleries Co.*, 251 U.S. 146 29
International Paper Co. v. *United States*, 282 U.S. 399 33
Iowa-Wisconsin Bridge Company v. *United States*, 114 C. Cls. 464, certiorari denied, 339 U.S. 982 18
Ivanhoe Irrigation District v. *All Parties and Persons*, 53 A.C. 696 ..... 34, 36, 45
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275 ..... 16, 34, 35, 45, 46
Kidd v. *Pearson*, 128 U.S. 1 29
Monongahela Navigation Co. v. *United States*, 148 U.S. 312 34
Mugler v. *Kansas*, 123 U.S. 623 29
Nebraska v. *Wyoming*, 325 U.S. 589 ..... 16, 36
Oklahoma v. *Atkinson*, 313 U.S. 508 ..... 13, 21, 22, 31
Omnia Co. v. *United States*, 261 U.S. 502 ..... 15, 32, 34
Rank v. *Krug*, 90 F. Supp. 773 45
Sheldon v. *Grand River Dam Authority*, 182 Okla. 24, 76 P. 2d 355 32
Southern Counties Gas Co. v. *United States*, 141 C. Cls. 28, certiorari denied, 358 U.S. 815 32
T.V.A., United States ex rel. v. *Powelson*, 319 U.S. 266 ..... 32, 34
United States v. *Central Eureka Mining Co.*, 357 U.S. 155 29
United States v. *Chandler-Dunbar Co.*, 229 U.S. 53 ..... 12, 18, 27
United States v. *Cress*, 243 U.S. 316 26
United States v. *Gerlach Live Stock Company*, 339 U.S. 725 ..... 16, 30, 32, 37, 43, 45
United States v. *Kansas City Life Ins. Co.*, 339 U.S. 799 18
United States v. *Kelly*, 243 U.S. 316 ..... 26, 27, 28
United States v. *Republic Steel Corp.*, No. 56, this term 20

Cases—Continued Page

United States v. *Rio Grande Irrigation Co.*, 174 U.S. 690 ..... 13, 21
United States v. *Santa Fe Pacific R. Co.*, 314 U.S. 339 44
United States v. *Smoot Sand & Gravel Co.*, 248 F. 2d 822 32
United States v. *Twin City Power Co.*, 350 U.S. 222 ..... 12, 13, 14, 18, 19, 28, 29, 45
United States v. *Union Pacific R. Co.*, 353 U.S. 112 44
United States v. *Willow River Co.*, 324 U.S. 499 27
Winters v. *United States*, 207 U.S. 564 ..... 36, 42
Wolfsen v. *United States*, 142 C. Cls. 383, certiorari denied, 358 U.S. 907 31

Constitution and statutes:

Act of July 26, 1866, 14 Stat. 251, R.S. 2376 ..... 37, 38, 43, 44
Act of April 26, 1906, 34 Stat. 137, Section 25 ..... 3, 43, 44, 45, 47
Act of July 6, 1954, 68 Stat. 450 9
Desert Land Act of 1877, 16 Stat. 377, 43 U.S.C. 321 ..... 17, 38, 43
Federal Power Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 791, *et seq.*:
Section 23(b) 2, 8, 20
Flood Control Act of August 18, 1941, 55 Stat. 638 ..... 7, 45
Oklahoma Session Laws, 1935, c. 70, Art. 4, as amended, 82 Okla. Stat. Ann. (1952), Sess. 861–881 4
60 Okla. Stat. Ann. (1949), Sec. 60 ..... 30, 39
82 Okla. Stat. Ann. (1952):
Sec. 1 ..... 30–31, 39
Sec. 862 ..... 4, 5
Sec. 862(a) 4
Sec. 862(e) 4, 34
Sec. 862(f) 5
Sec. 862(o) 34
Okla. Stat. Ann. (1952), Constitution 40
Reclamation Act of 1902, 32 Stat. 388, Sec. 8 45
Rivers and Harbors Act of 1890, 26 Stat. 426 ..... 13, 20
Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 33 U.S.C. 403 ..... 2, 20
Sec. 10, 30 Stat. 1151 2
United States Constitution:
Fifth Amendment 15, 27, 29
Fourteenth Amendment 29

Miscellaneous: Page

Appropriation vs. Riparian, A Preliminary Examination, 10 Okla. L.R. (1957) 416 42
H. Doc. No. 107, 76th Cong., 1st Sess., Cong. Doc. Ser. No. 10351 7
H. Doc. No. 308, 74th Cong., 1st Sess., Cong. Doc. Ser. No. 9936, Vol. 3 7
Weil, *Water Rights in the Western States* (3d ed., 1911):
Sec. 66 40
Sec. 117 39

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OPINIONS BELOW

The majority and the dissenting opinions in the Court of Claims (R. 106–113) are reported at 175 F. Supp. 153.

JURISDICTION

The judgment of the Court of Claims was entered on July 15, 1959 (R. 106–131). On October 8, 1959, the time within which to petition for a writ of certiorari was extended, by order of the Chief Justice, to October 30, 1959 (R. 132). The petition for a writ of certiorari was filed on October 29, 1959, and was granted on December 14, 1959 (R. 132). The jurisdiction of this Court rests on 28 U.S.C. 1255.

STATUTES INVOLVED

Section 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U.S.C. 403, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

Section 23(b) of the Federal Power Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 817, provides:

> It shall be unlawful for any person, State or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the

United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Section 25 of the Act of April 26, 1906, 34 Stat. 137, 146, is set out in the Appendix, *infra*, pp. 47–49.

Portions of the Oklahoma Session Laws, 1935,

c. 70, Art. 4, pp. 350, *et seq.*, as amended, 82 Okla. Stat. Ann. (1952), Secs. 861–881, are printed in the findings (R. 114–116). In addition, 82 Okla. Stat. Ann., Sec. 862 (quoted in part in the findings, R. 115), authorizes the Grand River Dam Authority:

> (a) To control, store and preserve, within the boundaries of the District, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the District; provided, however, that any municipal corporation within the area included within the jurisdiction of the said Grand River Dam Authority shall be entitled to take water from the Grand River and any of its tributaries in any quantities that may be needed by such municipal corporation without payment of any fees or charges for such water.

Section 862(e) (also quoted in part in the findings, R. 115) authorizes the Authority:

> (e) To acquire by purchase, lease, gift, or in any other manner, and to maintain, use and operate any and all property of any kind, real, personal, or mixed, or any interest therein; and to own, construct, operate and maintain any project or works in conjunction or jointly with any other department or agency of the State of Oklahoma or the United States of America, or any department or agency thereof, within the boundaries of the District, necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred upon it by this Act.

Section 862(f) (quoted in part in the findings, R. 116) authorizes the Authority:

> (f) To acquire by condemnation any and all property of any kind, real, personal or mixed, or any interest therein within or without the boundaries of the District necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act, in the manner provided by general law with respect to condemnation; provided that nothing in this Act shall ever be construed to authorize the District to acquire by condemnation any privately, municipally or publicly owned electric public utility system or any part thereof outside of the high water mark of a reservoir area or outside a properly located damsite, except the Districts may require the relocation of transmission lines and substations so owned where such relocation is necessary for the contruction and maintenance of dams, reservoirs, levees, spillways and floodways, and in such event just compensation shall be paid. Provided that the Grand River Dam Authority shall have the right to cross transmission lines of other electric utility companies under proper engineering standards of construction as approved by the Corporation Commission.

Section 862 concludes with the proviso, as follows:

> Provided, however, that in the course of exercising its powers as herein enumerated the said District shall at all times consider the rights and needs of the people living within and upon the land lying with the watershed of the rivers or streams developed by the District; provided, however, that nothing herein shall

prevent the District from selling for irrigation purposes within the boundaries of the District any water impounded by it under authority of law, provided that nothing herein contained shall authorize the State to engage in agriculture except for educational and scientific purposes and for the support of its penal, charitable, and educational institutions.

QUESTIONS PRESENTED

1. Whether the federal commerce power extends to tributary streams which, though not themselves navigable, substantially affect navigation, thus immunizing the United States, when it builds a dam upon such a stream for purposes which include the improvement of navigation and the control of floods, from liability to a State (or its agency) for depriving the latter of the economic opportunity to exploit the power potential of the waters.

2. Whether the State of Oklahoma so owned the waters of such tributary stream as to entitle its agency to compensation because of use by the United States of such waters for dam and reservoir purposes.

STATEMENT

The facts are substantially undisputed and may be summarized as follows:

The non-navigable Grand River originates in Kansas where it is called the Neosho River. It flows through Oklahoma in a southeasterly and southerly direction to the navigable Arkansas River. History relevant to the present controversy goes back to 1930 when the Army Corps of Engineers made intensive studies concerning possible development of dam and

reservoir projects, considering sites at Pensacola, Markham Ferry and Fort Gibson.[1] The resulting report to Congress concluded that federal development was not economically justified at that time. H. Doc. No. 308, 74th Cong., 1st Sess., Cong. Doc. Ser. No. 9936, vol. 3 (Fdgs. 1–3, R. 114).

In 1935, the respondent, Grand River Dam Authority ("the Authority"), was created by the State of Oklahoma (Fdg. 4, R. 114–116). The Authority prepared a plan for development of the river which contemplated dams (proceeding downstream) at Pensacola, Markham Ferry and Fort Gibson, a stretch of about 50 miles (Fdg. 6, R. 116–117; see Map R. 6A). At the same time, investigations (including public hearings) were being made as to the feasibility of a federal river-improvement plan, and the chairman of the Authority's Board of Directors suggested a cooperative effort (Fdg. 7, R. 117–118). The Army Engineers recommended to Congress construction and operation of a three-dam coordinated project as a federal undertaking (H. Doc. No. 107, 76th Cong., 1st Sess., Cong. Doc. Ser. No. 10351), and the Flood Control Act of August 18, 1941, 55 Stat. 638, 645, incorporated that Grand River plan into the comprehensive plan for the Arkansas River Basin (Fdg. 10, R. 121–122).

[1] Earlier, in 1929, a private corporation named Grand-Hydro was formed for the purpose of developing water power and irrigation on the Grand River but it never constructed a dam or any other works. See *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359. The District Engineer's Report in 1931 says that an organization known as the Grand River Power Company had obtained State of Oklahoma permits to erect a series of dams on the Grand River. H. Doc. No. 308, vol. 3, p. 1242.

With financing by the Public Works Administration, consisting of an $8,500,000 grant and an $11,500,000 loan, the Authority built the Pensacola project, which it finished in 1940 (Fdg. 8(a), R. 118). The Authority had filed a declaration of intention under Section 23(b) of the Federal Power Act. The Federal Power Commission found that the proposed project would affect the interests of interstate commerce, whereupon the Authority sought and was granted a Federal Power Act license. See *Grand River Dam Authority* v. *Grand-Hydro,* 335 U.S. 359, 366. The license provided that the project be operated under federal control, storage capacity between elevations 745 and 755 being expressly reserved for the control of floods (Fdg. 8(c), R. 119). In June 1941, the Secretary of War promulgated regulations to govern the operation of the Pensacola project (Fdg. 9, R. 121).

During World War II, the United States took over operation of the Pensacola project in the interests of national defense, and at the same time preliminary steps (including public hearings) were taken with a view to federal construction of the Fort Gibson dam. Definite construction plans were delayed, however, because of the wartime materials shortage (Fdgs. 11, 12; R. 122). In 1945, the Governor of Oklahoma expressed to the Chief of Engineers approval by the State of the federal plans for development of the Arkansas River, including the Fort Gibson project, and said (Fdg. 14(a), R. 123): "I am unable to find words with which to express my commendation for your able and progressive leadership before and dur-

ing the war in originating and developing this program * * *."

Construction of the Fort Gibson project was commenced in 1946 and completed in 1950, the powerhouse being completed in 1953. Its purpose is stated in the findings below (Fdg. 17, R. 125):

> The Fort Gibson project was constructed by the defendant [the United States] as an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of hydro-electric power on the Arkansas River, a navigable waterway, and its tributaries. The project has been operated to carry out these purposes.

The Fort Gibson project is a "run of the river" project, and production of power depends on releases from the Authority's Pensacola project. There is a maximum draw-down (*i.e.*, difference between the bottom and the top of the power pool) of three feet, and storage capacity between elevations 554 and 582 feet is reserved for flood control waters (Fdg. 18, R. 125).

Meanwhile, in 1946, the Authority had sought a preliminary permit to build a project at Markham Ferry, but the Federal Power Commission (in 1949) dismissed the application because of the authorization of a federal project. However, Congress, by the Act of July 6, 1954, 68 Stat. 450, modified the plan for the Arkansas River Basin so as to authorize construction of the Markham Ferry project by the Authority[2]

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[2] The 1954 Act authorized a $6,500,000 appropriation as a federal contribution because of flood control benefits, with a "release clause" when that amount should be received by the Authority. We understand, contrary to the implication of the

(Fdg. 21, R. 128). The Authority applied for, and in 1955 the Federal Power Commission issued, a license for the Markham Ferry project, subject to conditions as to federal control for navigation and flood control similar to the conditions applicable to the Pensacola project (Fdgs. 21–22, R. 128–130).

During the planning and construction phases of the Fort Gibson project, various claims to compensation were asserted by the Authority. The Corps of Engineers agreed that compensation was owing for the taking of any physical property of the Authority but not for "the intangible rights" claimed by it (Fdg. 15, R. 124). A 70-acre tract which the Authority owned was condemned, and mutually agreeable arrangements were made for the federal acquisition of flowage rights over lands of the Authority and for relocation of transmission lines, $210,140.80 being paid to the Authority (Fdg. 19, R. 125–126).

The Authority asked the Federal Power Commission to assess against the United States an annual charge because of the benefits alleged to accrue to the Fort Gibson project from storage at the Pensacola project. The Power Commission refused on the ground that the Power Act did not authorize such assessment of charges against the United States, and the Court of Appeals for the Tenth Circuit concurred in this conclusion. *Grand River Dam Authority* v.

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majority opinion and the findings of the Court of Claims that this sum has been appropriated. However, it has not yet been paid; hence it would be premature to discuss here the question whether acceptance would constitute a release of the present claims.

Federal Power Com'n, 246 F. 2d 453 (Fdg. 20, R. 126–127).

This suit was filed in May 1956 to recover $10,000,000 on the grounds of a taking (as summarized by the majority of the Court of Claims (R. 107)) of (1) the Authority's water power rights at the Fort Gibson unit, (2) its exclusive franchise to develop electric power and energy at the Fort Gibson unit, and (3) certain items of severance damages, including storage and headwater benefits accruing from the Pensacola unit to the Fort Gibson unit; the cost and value of surveys, plans and specifications for the Fort Gibson unit; and the loss of the use and value of certain lands and rights-of-way theretofore acquired for the interconnection of the Fort Gibson unit with the Authority's system and for the distribution of electric power and energy from the Fort Gibson unit. The claims asserted under "(3)" may be disregarded since they were rejected by the Court of Claims and no review has been sought of that ruling. The proceedings below were limited to the issue of liability, with questions as to the amount of compensation or damages reserved.

The majority of the Court of Claims held that the United States was liable on the first two claims (R. 106–110). Two judges dissented on the ground that there was no taking of private property, but simply the exercise of the superior right of the United States to erect the Fort Gibson dam in aid of navigation and commerce (R. 110–113).

SUMMARY OF ARGUMENT

I

Respondent Authority has been (or will be) paid for all fast lands, easements, power lines and physical property affected by the construction of the Fort Gibson Dam and Reservoir. The only question is its right to compensation for the alleged taking of its "vested water rights" and of its state "franchise" to develop electrical energy at the Fort Gibson site.

A. The Court of Claims has distinguished the line of cases represented by *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, and *United States* v. *Twin City Power Co.*, 350 U.S. 222, on the ground that the Grand River, unlike the streams involved in those cases, is non-navigable. *Twin City* (and like cases) held that, when the United States exercises its superior commerce power, it incurs no obligation to a riparian owner who has lost, as a result of such regulation, the prospect of utilizing the water power inherent in the fall of the river. This Court, in *Twin City*, reasoned that the riparian owner had no right to place a dam in the stream—an act long prohibited in the absence of a federal license—and that he had no complaint when the United States exercised its prerogatives directly instead of delegating them by license. "What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys." 350 U.S. at 228. A right under state law to develop hydroelectric power "has value or is an empty one

dependent solely on the [Federal] Government" (*ibid.*).

We think that no distinction can properly be drawn between *Twin City* and the instant case on the ground that the Grand River is non-navigable. The question, in our view, is not whether the Grand River is navigable but whether it directly and substantially affects navigation and commerce in the Arkansas River Basin. If so, the Fort Gibson project is within the federal power and the consequences are no different than they would be if the dam were a few miles below, rather than a few miles above, the historic head of navigation.

As early as *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, construing the Rivers and Harbors Act of 1890, this Court emphasized that the United States may protect the "navigable capacity" of a navigable stream and that the statute, which prohibited obstructions to such capacity, was not to be confined to acts done within the navigable stream itself. And in *Oklahoma* v. *Atkinson*, 313 U.S. 508, involving an attack by the State against the authority of the United States to construct the Denison Dam on the non-navigable Red River, the Court unanimously upheld that authority, pointing out that control of non-navigable waters may "be essential or desirable in the interests of the navigable portions" and may constitute "the key to flood control" on the navigable stream (pp. 525–526).

This very respondent, when it was in the position of condemnor (*vis-à-vis* a private company claiming

power-site value for its fast lands) as a result of having been licensed by the Federal Government to construct the Pensacola Dam on the Grand River (see *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359), advised this Court that the Grand River is an important and principal tributary of the navigable Arkansas; that the contemplated Pensacola, Markham Ferry and Fort Gibson Dams were indispensable and integral parts of the comprehensive plan authorized by Congress for the Arkansas River Basin; and that it was "established beyond controversy" that control of the Grand River fell within the federal commerce power. It further stated that a right conferred by state permit "fades and disappears" when asserted against the United States or its licensee (a point which this Court did not find it necessary to decide in the *Grand-Hydro* case because it concluded that the Authority had *not* proceeded against the condemnee in its capacity as a federal licensee).

The Court of Claims, moreover, has unequivocally found that the Fort Gibson project is an "integral part of a comprehensive plan for the improvement and regulation of navigation, the control of floods, and the production of hydroelectric power on the Arkansas River and its tributaries." Since the Government's project can be viewed only as an appropriate exercise of the commerce power, the rule of the *Twin City* case applies with full force: The United States, having exercised its prerogatives in lieu of delegating them, does not thereby become liable to those whose interests are subordinate.

B. Moreover, on ordinary eminent domain principles, it appears that there has been no taking of property giving rise to a right of compensation.

The Authority, although it asserts the loss of "vested water rights," is in no position to claim loss of riparian rights since no riparian land is involved. Moreover, it does not bring itself within the doctrine of prior appropriation for it does not assert that it has put to beneficial use any water of which it will be deprived by construction and operation of the Fort Gibson Dam. The water put through the Government's turbines at Fort Gibson (water already twice used by the Authority at upstream points) is not in fact consumed or diverted; it is simply returned to the river.

Respondent also claims that the Federal Government has taken its state franchise to produce hydroelectric power at Fort Gibson. But, apart from the fact that respondent has no monopoly under state law, there is a sharp distinction to be drawn between a taking and a frustration. *Omnia Co.* v. *United States,* 261 U.S. 502. The Government has not taken respondent's state authorization, for which it has neither need nor use; it has simply exercised its own prerogatives. The loss of business opportunities, hopes or expectancies is not compensable under the Fifth Amendment.

II

One premise of the decision below is that, under the doctrine of prior appropriation, the State of Oklahoma owns *all* the waters within its borders, including unappropriated waters. If accepted, that

declaration would reject the long-continued position of the United States that the western States do not own all the *unappropriated* water within their boundaries. The Federal Government has urged that position for many years but it has not been decided, and was found by this Court unnecessary to decision in *Nebraska* v. *Wyoming*, 325 U.S. 589, and *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275. So here, we believe that this far-reaching question need not be decided because the respondent Authority has failed to sustain its burden of showing ownership by the State of Oklahoma of all the water flowing in the Grand River.

A. Decisions of this Court which are collected, and the history of which is traced, in *United States* v. *Gerlach Live Stock Company*, 339 U.S. 725, and *Federal Power Commission* v. *Oregon*, 349 U.S. 435, make it clear (1) that rights to water, like other property rights in the western States, must stem from some grant by Congress and (2) that the adoption by Congress of certain applications of the prior appropriation doctrine did not constitute a grant to the various States of all the water, including that not appropriated to beneficial use, flowing in those States. The contrary view of the Court of Claims—the only basis given for its declaration of state ownership—is plainly wrong.

B. The Authority has not shown any other basis establishing Oklahoma's title to the waters of the Grand River used by the Fort Gibson project. While Oklahoma water law is far from clear, it is, at least, plain that both the riparian and appropriation doc-

trines exist there to some extent. According to the Authority, the Grand River flows through what was formerly Indian Territory and in that territory the riparian doctrine was followed. But the riparian doctrine does not support the Authority's position here—as we have pointed out in Point I—nor does the 1906 statute (relied upon by the Authority) relating to developments by private power companies within the Indian Territory constitute a grant to the State of Oklahoma of all unappropriated waters.

Moreover, the assertion that upon statehood the appropriation doctrine automatically applied to all of Oklahoma is clearly wrong, as is shown by the Oklahoma decisions and legislation. Even if it did, the Authority has not shown under what federal statute the State acquired its asserted ownership of unappropriated waters. The Desert Land Act, relied upon by other States for this purpose, does not help Oklahoma since Congress has not applied it to Oklahoma. The decisions of this Court which have been cited for the proposition that state laws governs all questions of water right law do not so hold. And a State cannot, by the device of a so-called "legislative appropriation" of waters not put to beneficial use, create rights as against the United States which it has not granted.

ARGUMENT

I

THERE WAS NO TAKING OF PROPERTY OF RESPONDENT FOR WHICH IT HAS NOT BEEN PAID

Preliminarily, it is important to state what is *not* involved in this case. The Authority has been, or

will be, paid for all physical properties taken in fee or to be flooded by the Government, *e.g.*, transmission lines which must be relocated because of the federal project. Moreover, there is no question relating to compensation for fast lands required for the dam or reservoir.[3] The claim is, rather, that the United States has taken the Authority's "rights" in the flow of the river and its state franchise to develop electrical energy from that source, and that for the taking of these "rights" the United States is required by the Fifth Amendment to make compensation.

A. THE UNITED STATES HAS DIRECTLY EXERCISED FEDERAL PREROGATIVES CONFERRED BY THE COMMERCE POWER. IT IS NOT REQUIRED TO PAY COMPENSATION BECAUSE IT HAS FOLLOWED THAT COURSE IN LIEU OF GRANTING A LICENSE TO A STATE INSTRUMENTALITY.

In *United States* v. *Twin City Power Co.*, 350 U.S. 222, this Court reaffirmed the rule, enunciated many years ago in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, that there can be no right as against the United States in the flow of the waters of a navigable stream. For this reason, the Court held that the owner of fast lands taken by the United States in connection with a multi-purpose dam project could not include as an element of compensable value the suitability of the lands for purposes related to the development of water power. "What the Government can grant or withhold and exploit for its own benefit," the

[3] For this reason, cases like *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799, and *Iowa-Wisconsin Bridge Company* v. *United States*, 114 C. Cls. 464, certiorari denied, 339 U.S. 982, cited by the Court of Claims (R. 108), which involved damage to physical property above high water mark, are inapposite here.

Court stated (p. 228), "has a value that is peculiar to it and that no other user enjoys." "To require the United States to pay for this water-power value would be to create private claims in the public domain." *Ibid.*

Here, as in *Twin City*, we deal with a federal project—a project which concededly serves the purposes of navigation, flood control, hydroelectric power and general watershed development. In the absence of a license from the Federal Power Commission, there could have been no comparable undertaking by a State or its instrumentality or by any private person.[4] The only possible distinction between *Twin City* and this case is that the Savannah River was found to be navigable, whereas the Grand River, involved in this litigation, is a non-navigable river which affects stages of the navigable Arkansas River. The Court of Claims has found this distinction significant. It has rested upon the fact of non-navigability and upon this basis, coupled with its assumption (challenged in Point II, *infra*) that Oklahoma "owns the waters of the Grand River" (R. 108–109),[5] it has held the United States liable to the Authority.

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[4] See *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, 365–366.

[5] In this connection, the court below found (Fdg. 23, R. 131): "The Board of Directors of the plaintiff has never granted to the defendant, or to any department or agency thereof, any franchise, right, or privilege to develop and generate electric power and energy on the Grand River in Oklahoma, or any right, title, or interest in and to the waters of the Grand River for the production of electric power and energy, or any right to control, supervise, conserve, and develop the water power at the Fort Gibson dam-and-reservoir project."

It is not crucial, we submit, that the Grand River is non-navigable at the point where the Federal Government has undertaken to control it. If the flow of the river at such point has a direct and substantial effect upon the river system in its navigable reaches, then, we believe, the United States has the same plenary control as it has over navigable portions of the system. In other words, if the project serves the purposes of navigation, flood control and watershed development—and the Court of Claims has found that it does—the Fort Gibson site is as much subject to the dominant control of the United States as it would be if it were located below the historic head of navigation.[6] And, in our view, the same consequences must follow.

The authorities, we submit, fully support this thesis.

The Rivers and Harbors Act of 1890, 26 Stat. 426, was the first general statute prohibiting obstructions to the navigable capacity of streams.[7] Shortly after

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[6] In point of fact, Fort Gibson, located on the Grand River, is approximately eight miles above the confluence of that river with the navigable Arkansas.

[7] The 1890 Act was revised in 1899 by the Rivers and Harbors Act of that year, 30 Stat. 1121, 33 U.S.C. 403, *et seq.* See discussion of the history of the latter Act in the Government's brief in *United States* v. *Republic Steel Corp.*, No. 56, this Term. Commerce control in relation to water power development was further exercised in the Federal Power Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 791, *et seq.* That statute was subsequently amended to enlarge federal control over non-navigable tributaries of navigable streams by making it mandatory to file declarations of intention in relation to proposed projects on non-navigable waters. See Section 23(b), *supra*, pp. 2–3.

its enactment, this Court, in *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, held (p. 708) that the United States has the constitutional power to guard against incursions upon the "navigable capacity of one of the navigable waters of the United States" and that it would "improperly ignore" the scope of the statute to limit its operation to acts done within the navigable stream itself.

The power of the United States to regulate and control non-navigable tributaries of navigable streams was the core of the controversy in *Oklahoma* v. *Atkinson*, 313 U.S. 508. In that case, this Court unanimously sustained, as against the objections of the State of Oklahoma, the authority of the United States to construct the Denison Dam on the non-navigable Red River. There, as here, one of the functions of the dam was the production of hydroelectric power. The language of this Court is unequivocal. It "is clear," the opinion declares (p. 523), "that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions." "For, just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries" (pp. 525–526). The suggestion that the "project interferes with the State's own program for water development and conservation is likewise of no avail," the Court concluded

(pp. 534–535). "That program must bow before the 'superior power' of Congress" (p. 535).[5]

It cannot be suggested that the Fort Gibson Dam is in any way less "essential or desirable" from the standpoint of flood control and navigation improvement than was the Denison Dam. The Fort Gibson project, as the Court of Claims found, is "an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of hydroelectric power on the Arkansas River and its tributaries" (Fdg. 17, R. 125). The fact that 28 vertical feet of the dam are reserved for control of flood waters (Fdg. 18, R. 125) is striking evidence of the fact that this is a project unquestionably within the scope of the federal commerce power.

In *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, it was the Authority (respondent in this case) which urged (1) that control of the Grand River is essential in the national interest and fully within the commerce power, and (2) that no State-created interests in the waters of the river, or rights of compensation based thereon, could be asserted in the face of the Federal Government's exercise of its commerce control. On that occasion, to be sure, the shoe was on the other foot. The Authority had obtained from

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[5] The opinion discloses (p. 512) that Oklahoma claimed that there would be a "direct invasion and destruction" of the sovereignty and property of the State because "the waters to be impounded belong to Oklahoma but will be taken from it without payment of just compensation". The State also stressed that waters would be diverted from Oklahoma and run through turbines for the generation of power for sale, principally in Texas.

the Federal Power Commission, in 1939, a license authorizing the Pensacola Dam as a project "affecting navigable waters." 335 U.S. at 366. The question was the measure of compensation to be paid by the Authority in Oklahoma condemnation proceedings brought against Grand-Hydro, a private company, for the acquisition of fast lands needed in the project. Grand-Hydro, which had received a state permit in 1931 to construct a dam and develop hydroelectric power at the site, claimed (and the Oklahoma courts agreed) that it was entitled to the value of its land for power-site purposes. See 335 U.S. at 361–363.

In asking this Court to hold that power-site value should not have been allowed by the Oklahoma courts, the Authority stressed, first, that the "Grand River is subject to federal control" (No. 379, Oct. Term, 1947, Petition, p. 26). Referring at length (*id.*, pp. 26–31) to studies by the Corps of Engineers, the Federal Power Commission and the Congress, it asserted that the "Grand River is an important as well as the principal tributary of the Arkansas" (*id.*, p. 26); that the Pensacola, Markham Ferry and Fort Gibson Dams were to be integral parts of a "general comprehensive plan" for the Arkansas River basin "approved by the 1938 Flood Control Act" (*id.*, p. 27); and that "for many years" it has been "established beyond controversy that the Grand River in Oklahoma is such a stream as Congress has jurisdiction over under the Commerce Clause of the Constitution" (*ibid.*).[9]

[9] This statement is to be contrasted with the Authority's suggestion in the instant case (Br. in Opp., p. 13) that the Government would assert federal control over "every rivulet,

The Authority argued, secondly, that inasmuch as it had a federal license and Grand-Hydro did not, Grand-Hydro could not assert any element of value predicated upon its state authorization to harness the waters. We quote again from the Authority's argument (*id.*, pp. 33–34):

> It is indisputable under the record in this case that Congress has assumed and preempted jurisdiction over the Grand River through the passage of the Federal Water Power Act of June 10, 1920, as amended by the Federal Power Act of August 26, 1935, enacted under its authority to regulate interstate commerce; that no riparian owner could acquire the right to utilize the waters of the river or lands riparian thereon for the production of electric power and energy without complying with the provisions of the Federal Power Act. The respondent never complied with the provisions of said Act or acquired under Federal law such right of use. On the other hand, the petitioner did comply with the provisions of the Federal Power Act and obtained from the Commission a license to construct, maintain, and operate its project at the Pensacola location on Grand River, effective January 1, 1939. The date of taking was January 19, 1940. At that time, the respondent could not possibly have acquired such right of use because the petitioner had been granted by the Federal Power Commission

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creek and stream." On the contrary, we rest on the propositions that the Grand River directly and substantially affects federal commerce interests, and that federal control is necessary to achieve the navigation and flood control program approved by Congress for the Arkansas River basin.

> the exclusive right to build and operate its project at the Pensacola location. The respondent not only had not and could not acquire such right of use, but was prohibited by the Federal Power Act from making such use of its lands and the waters of the river. *Respondent's claim to such right of use by virtue of its State permit fades and disappears in the face of this prohibition.* [Emphasis added.]

Although this Court affirmed the state court judgment in favor of Grand-Hydro, it did so in an opinion which inferentially supports the view which we urge in this case. The Court pointed out that the Authority had proceeded in the state courts, under Oklahoma's law of condemnation, in its capacity as a state agency. The opinion turns on the fact that the Authority had not proceeded in its capacity as a federal licensee. The Court observed that the considerations might be "different" if "either the United States, or its licensee as such, were seeking to acquire this land under the Federal Power Act" (335 U.S. at 373). The opinion then adds, "The United States enjoys special rights and power in relation to navigable streams *and also to streams which affect interstate commerce*" (*ibid.;* emphasis added).

The dissenting opinion in *Grand-Hydro* (in which four Justices joined) objected to the decision on the ground that water power value ought not be allowed whether the condemnation is instituted under the authority of federal or state law. In relation to the scope of the commerce power, the dissenters stated (p. 375, fn. 1):

> The exclusive control which the United States has in the water power of a navigable stream (*United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 69; *United States* v. *Appalachian Electric Co.*, 311 U.S. 377, 427–428) extends to the water power of a non-navigable stream where private command over it is inconsistent with the federal program of control over navigation. *United States* v. *Willow River Co.*, 324 U.S. 499, 509. Federal regulation and control has the same effect in each case. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 525.

Thus, both the majority and the dissenting opinions in the *Grand-Hydro* case appear to recognize that action taken by the United States in the interest of commerce control has the same effect irrespective of whether the stream in question is a navigable one or one which, though not navigable, substantially affects navigation.

It is true that in the case of *United States* v. *Kelly*, 243 U.S. 316 (commonly cited by reference to the companion case, *United States* v. *Cress*, 243 U.S. 316), one of the elements of compensation allowed (an award of $1,500) was based on the fact that the Government's river improvement project had ended the usefulness of a mill located on a non-navigable tributary and operated by a riparian owner. The Court expressed the view that a riparian right to an unobstructed flow of water "exists by the law of nature as an inseparable part of the land" and that "destruction of this right is a taking of a part of the land" (p. 330). The opinion does not rest upon any distinction as between navigable and non-navigable streams, but,

rather, upon the view that riparian owners have certain absolute rights, conferred by the law of nature, to the flow of water, and that impairment of these rights gives rise to a claim under the Fifth Amendment.

This broad statement does not square with any of the pronouncements of this Court from the date of the subsequent *Chandler-Dunbar* case (decided in 1913) to the present day. And although the Court has not expressly overruled *Kelly*, it has all but done so. The *Kelly* case, this Court stated in *United States* v. *Willow River Co.*, 324 U.S. 499, 507, "must be confined to the facts there disclosed." The Court added (p. 510), in language strikingly opposed to that used in *Kelly*:

> Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interests must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

Assuming that the *Kelly* case has some measure of continuing vitality, it certainly has no application to the facts here. There was no suggestion in *Kelly* that the small mill there involved had any effect on navigable capacity whatever or that its operation interfered in any way with commerce. The mill, moreover,

had been in operation when the United States destroyed its utility by altering the water level. In the instant case, the Authority seeks compensation because the action of the United States destroys a hope or expectancy, namely, that the Authority might, one day, build a dam and produce electric power. However, the construction of a dam at Fort Gibson was flatly prohibited, at all relevant times, by federal law, in the absence of a federal license. Respondent accordingly is not seeking compensation for a going enterprise, conducted in conformity with law, suddenly destroyed in consequence of a federal project. It is seeking compensation because its hopes have been frustrated by the act of the United States in exercising its "superior right" to regulate the stream—because the Federal Government has chosen to exercise its undoubted prerogatives and to build the public project itself, instead of licensing someone else to do it.[10]

We are thus brought back to the principle only recently reaffirmed in the *Twin City* case. Respondent's right under state law "has value or is an empty one dependent solely on the [Federal] Government" (350 U.S. at 228). When the United States exercises control over waters in the public domain, it is not required to pay compensation to those whose hopes or expectations have been frustrated. As in the case of the Twin City Power Company, the Authority in this case "never had a power project

[10] In *Kelly*, moreover, the conclusion was that there had been "a taking of a part of the land." Here, the right asserted is in the stream itself.

on the [river] and as a result of the Government's preemption never can have one." *Twin City, supra,* 350 U.S. at 227.[11]

B. SETTLED PRINCIPLES OF EMINENT DOMAIN LAW BAR A RECOVERY IN THIS CASE

If we are correct in our argument (Point I, A, *supra*) that the Fort Gibson project was an appropriate exercise of the commerce power and that the United States may not be required to compensate for State-created rights when it exercises that power, it is unnecessary to go further. However, we point out additionally that in all events there has been no destruction of property rights upon which the Authority may rest a claim to compensation.

The Authority cannot, of course, claim damage to riparian rights; no riparian land is involved. The Authority does claim water rights based upon the doctrine of appropriation. The doctrine of appro-

[11] The *Twin City* case also points out that this is not a matter of competing property interests. The Commerce Clause "speaks in terms of power, not of property." 350 U.S. at 224. The commerce power may be analogized, in this respect, to the police power of the States to regulate or prohibit the conduct of business enterprises deemed inimical to the public interest. Even where the exercise of such power results in the destruction of a going business, the Fourteenth Amendment does not require compensation by the States. *Mugler* v. *Kansas*, 123 U.S. 623; *Kidd* v. *Pearson*, 128 U.S. 1; cf. *Euclid* v. *Ambler Co.*, 272 U.S. 365. Similarly, the Fifth Amendment imposes no duty on the Federal Government to compensate for business losses (no less, for loss of expectancies) resulting from the exercise of its regulatory functions. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146; *Bowles* v. *Willingham*, 321 U.S. 503; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155.

priation, however, is premised upon prior beneficial use (as is explicitly recognized in the authorities from which respondent quotes (Br. in Opp., p. 8)). In discussing the development of the appropriative doctrine in California, this Court concluded in *United States* v. *Gerlach Live Stock Company*, 339 U.S. 725, 751–752:

> Riparianism, pressed to the limits of its logic, enabled one to play dog-in-the-manger. The shore proprietor could enforce by injunction his bare technical right to have the natural flow of the stream, even if he was getting no substantial benefit from it. This canine element in the doctrine is abolished. "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, ..." This limitation is not transgressed by the awards in question which only compensate for the loss of actual beneficial use.

The statutes of Oklahoma demonstrate that the same essential principles apply in that State.[12]

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[12] 60 Okla. Stat. Ann. (1949), Sec. 60, provides:

"The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same."

And 82 Okla. Stat. Ann. (1952), Sec. 1, states:

"Beneficial use shall be the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes shall be appurtenant to specified lands

In the instant case, there is no showing that the United States has interfered with a prior beneficial use of the waters by the Authority. Indeed, the water running through the Government's turbines at Fort Gibson—water which has already been used twice by the Authority at points upstream (see R. 77)—is not consumed at all; it is returned to the river. Moreover, unlike the situation at the Denison Dam, involved in *Oklahoma* v. *Atkinson, supra,* the water which runs past Fort Gibson continues to flow through Oklahoma. The Authority would seem to be in no better position than the plaintiff in *Wolfsen* v. *United States,* 142 C. Cls. 383, certiorari denied, 358 U.S. 907, whose claim that his water rights were taken as a consequence of the Central Valley development was rejected on the ground that "plaintiffs were not entitled to compensation for a legal technicality. They must first show that something of substance has been taken from them."

Here, the only interference has been with a potential use—use of the water for power purposes at the Fort Gibson site. Respondent's claim of "vested water rights" is but another formulation of its contention that the United States must pay Oklahoma or its

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owned by the person claiming the right to use the water, so long as the water can be beneficially used thereon. Priority in time shall give the better right. Provided, that in all cases of claims to the use of water initiated prior to November 15th, 1907, the right shall relate back to the initiation of the claim and beneficial use of such water. All claims to the use of water initiated thereafter shall relate back to the date of receipt of an application therefor in the office of the state engineer, subject to compliance with the provisions of this chapter and the rules and regulations established thereunder."

agent for the privilege of constructing and operating the federal project. Such an interpretation of water law is to revert to the "dog-in-the-manger" possibility—to the approach which this Court said in *Gerlach* was abolished by the prior appropriation doctrine.[13]

Apart from its claim that it had vested water rights, the Authority asserts that its franchise to generate electric power has been taken.[14] But a franchise to engage in a business in the future, unaccompanied by the grant of any right in property, does not give rise to a right of compensation under the law of eminent domain.[15] "Frustration and appropriation are essentially different things," *Omnia Co.* v. *United States* 261 U.S. 502, 513. And see *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 281–283. There could have been no "taking" of respondent's franchise, moreover, because the construction of the project by

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[13] As to the Court of Claims' erroneous assumption that Oklahoma owns the waters of the Grand River, see Point II, *infra*, pp. 35–46.

[14] The Court of Claims states that this franchise was "exclusive" (R. 107). But this does not appear to be the view of the Supreme Court of Oklahoma. See *Sheldon* v. *Grand River Dam Authority*, 182 Okla. 23, 30, 76 P. 2d 355, 363.

[15] The situation is, of course, different where the franchise itself confers rights in specific real property. Such was the case in *Southern Counties Gas Co.* v. *United States*, 141 C. Cls. 28, certiorari denied, 358 U.S. 815 (property rights in the nature of easements), and *United States* v. *Smoot Sand & Gravel Co.*, 248 F. 2d 822 (C.A. 4) (right to remove sand and gravel from tract of land), both cited in the opinion below (R. 109).

the United States in nowise depended upon a permit from the State or its agency.[16]

The Court of Claims cites two decisions of this Court for the proposition that compensation must be paid for the appropriation or destruction of a franchise. The earlier of these, *Frost* v. *Corporation Commission,* 278 U.S. 515, held simply that the owner of a franchise has a right to prevent illegal competition by unlicensed competitors. However, the Authority will hardly argue that the federal project was illegally undertaken or that the United States required a state license.

The second of the cases is *International Paper Co.* v. *United States,* 282 U.S. 399. There, it appeared, the United States had requisitioned, during World War I, electrical energy being produced by the Niagara Falls Power Company. The requisition authorized the power company to increase its hydroelectric capacity by appropriating water which was being taken, pursuant to an existing federal license, by the International Paper Company. This Court concluded that the United States, by its requisition, assumed the obligation to compensate the paper company for the loss of its water supply. The decision rests squarely upon the holding that the paper company had been granted a right to the use of the water subsequently requisitioned and that the Federal Government had not attempted to revoke the grant which it had previously made. What was taken there was

[16] The Court of Claims' finding (Fdg. 23, R. 131, *supra*, p. 19) that the Board of Directors of the Authority did not grant any rights to the United States is irrelevant.

an established and unrevoked right previously enjoyed and put to use.[16a]

In sum, respondent's claim, based upon its state franchise, is no more than a claim that a prospective business opportunity was lost. Such frustration, resulting as it does from the lawful act of the United States, is not compensable as a taking of private property for public use.[17]

[16a] *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, is also readily distinguishable. We refer to this Court's comment in *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282, n. 12:

"* * * In the *Monongahela* case the United States condemned a lock and dam constructed at the invitation of the United States and operated by the owner under a franchise from Pennsylvania. This Court held that the special facts of the case required that the franchise or going concern value of the enterprise be included in the compensation payable to the owner. It was said in the first place that the franchise granted to the company by Pennsylvania was a valuable property right, since it was a contract under the rule of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, and protected against impairment by the state. Secondly, the Court noted that the United States did more than destroy the business; it appropriated the enterprise for public purposes. Moreover, as was stated in *Omnia Co.* v. *United States*, *supra*, pp. 513–514, the *Monongahela* case 'rested primarily upon the doctrine of estoppel, as this Court has in several cases since pointed out.'"

[17] We note in passing that the Oklahoma Act which created the Authority and conferred the so-called "franchise" contemplated that the development of a system of dams on the Grand River would be a cooperative effort of the Authority and the United States. See, *e.g.*, Section 862(e), *supra*, p. 4, and 862(o), R. 116. Thus, properly speaking, we do not believe that the federal project involves any frustration of either state or federal objectives. Compare *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, and the opinion of the California Supreme Court on remand, *Ivanhoe Irrigation District* v. *All Parties and Persons*, 53 A.C. 696, 718; see also *infra*, pp. 35–36, 45.

II

RESPONDENT HAS NOT PROVED OWNERSHIP BY THE STATE OF OKLAHOMA OF ALL THE WATERS WITHIN ITS BORDERS

One premise of the Court of Claims is its declaration (R. 109):

> The State of Oklahoma owns the waters of the Grand River, a non-navigable stream, and the State conferred on the plaintiff all the rights which is [*sic*—it] possessed in the stream. Oklahoma does not follow the common law doctrine of riparian rights but follows instead the doctrine of prior appropriation for beneficial use or the so-called "Arid States Doctrine." Under this doctrine, the water running in a natural stream is the property of the State. Oklahoma Code, Title 60, Section 60 and Title 82, Section 1, O.S. 1951; *Murphy* v. *Kerr,* 296 Fed. 536.

This statement is erroneous and cannot properly provide a foundation for the holding below.

It should be pointed out again that this case deals solely with unappropriated waters; as we have shown *supra,* pp. 29–32, there is no issue as to waters which have been appropriated and put to beneficial use. This problem of the ownership of *unappropriated* waters in the western States is both recurrent and of large importance. In our brief *amicus curiae* in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, at pp. 66–69, we outlined the basis of our contention that title to unappropriated water is not vested in the State of California, but pointed out that, as in

Nebraska v. *Wyoming,* 325 U.S. 589, it was unnecessary to decision of that case to determine that issue.[18] In response, the Court said (pp. 290–291): "At the outset we set aside as not necessary to decision here the question of title to or vested rights in unappropriated water. Cf. *Nebraska* v. *Wyoming,* 325 U.S. 589, 611–616 (1945)." The California Supreme Court, upon remand, likewise recognized that, "It is now also crystal clear that the title of the state or of the United States to the unappropriated waters of this state is not involved in these cases." *Ivanhoe Irrigation District* v. *All Parties and Persons,* 53 A.C. 696, 719. The California court went on to point out that, in view of this court's holding, the "trust" theory declared in the first *Ivanhoe* opinion of the California Supreme Court—that the State holds title to the unappropriated waters in trust for all the people of the State—"is not the law of this case, is dicta, and for that reason should not be construed as a statement of the law of California" (*id,* p. 720). The three-sentence declaration by the Court of Claims in this case, if accepted generally, would cut even deeper than the "trust" theory originally advanced in *Ivanhoe.*[19] But that declaration is wrong for various reasons, some related specifically to Oklahoma and some to western water law generally. It seems unnecessary to discuss

[18] It has been argued to the special master in proceedings now pending before him in *Arizona* v. *California,* No. 9, Original.

[19] One aspect of the question is the holding in *Winters* v. *United States,* 207 U.S. 564, 577, that there was an implied reservation of waters for irrigation purposes for the benefit of Indians which was not affected by admission of Montana to the Union "upon an equal footing with the original States."

the broad subject of ownership of unappropriated waters as generally applied to the western States which follow the doctrine of prior appropriation for beneficial use, with variations in many particulars, because the respondent Authority has clearly not borne its burden of establishing ownership by the State of Oklahoma of the waters involved here.

A. THE COURT OF CLAIMS' THEORY OF OWNERSHIP BY THE STATE IS PLAINLY ERRONEOUS

The Court of Claims' theory is simply that, *as a necessary part of the appropriation doctrine,* "the water running in a natural stream is the property of the State." In our view, that primary assumption is wholly incorrect. It is contradicted by two principles which this Court has already affirmed. First, in those States formed out of territory such as the Louisiana Purchase acquired after the country was established, the Federal Government was the initial proprietor, and any claim by the State or by others must derive from this federal title. Second, there is no showing that the United States has granted to the States, through recognition of the appropriation doctrine, residual rights to the *unappropriated* waters.

In *United States* v. *Gerlach Live Stock Company,* 339 U.S. 725, Mr. Justice Jackson, for the Court, pointed out (at pp. 746–748) (a) that, in California before the post-Civil War federal legislation on the subject, the United States, as the owner of the whole public domain, was in a position to challenge appropriative rights, and (b) that in the Act of July 26, 1866, 14 Stat. 251, R. S. 2379, Congress recognized *appropriations* of public domain waters, which rested on local cus-

tom or law. And in *Federal Power Commission* v. *Oregon*, 349 U.S. 435—referring to the 1866 Act, the amendatory 1870 Act and the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. 321—the Court held (pp. 447–448) that the purpose of these statutes "was [federal] governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs" and that the "Desert Land Act severed, *for purposes of private acquisition* [emphasis added], soil and water rights *on public lands*, and provided that such water rights were to be acquired in the manner provided by the law of the State of location." There was no suggestion either in *Gerlach* or in *Oregon* that *unappropriated* waters had been disposed of by Congress.

These decisions make two things clear. First, they recognize that the right to use of water, as in the case of real property secured by the Louisiana Purchase and subsequent acquisitions, must be founded upon some grant by Congress, which has plenary authority to dispose of the public property. Second, the decisions are premised on the proposition that the adoption by the United States of the appropriation doctrine for purposes of acquisition of private rights did not constitute a grant to the western States of title to *all* the waters within their boundaries. The Court of Claims was plainly wrong in holding otherwise. The mere fact that a western State has adopted, in whole or in part, the appropriation system does not mean that the State owns rights to the unappropriated

waters. Some further grant by Congress must be shown.

B. THE AUTHORITY HAS NOT SHOWN STATE OWNERSHIP OF THE WATERS USED BY THE FEDERAL GOVERMENT'S DAM

It seems to us unnecessary to explore with respondent the intricacies and obscurities of Oklahoma water law. For present purposes, it is sufficient to show that the Authority has clearly not borne the burden of proving State ownership of the waters used by the Fort Gibson dam. There is no merit in any of the special grounds heretofore advanced by the respondent in support of its assertion of State ownership.

1. We agree with the Authority that Oklahoma does not follow, solely and exclusively, the doctrine of prior appropriation, as the Court of Claims thought when it erroneously concluded (*supra*, p. 35) that the appropriation doctrine necessarily means that the state owns the unappropriated waters. See *e.g.*, 60 Okla. Stat. Ann. (1949), Sec. 60, and 82 Okla. Stat. Ann. (1952), Sec. 1, quoted *supra*, fn. 12, pp. 30–31; see, also, *Baker* v. *Ellis*, 292 P. 2d 1037, 1039, where the Oklahoma court referred to its earlier decision concerning rights of riparian owners as against each other, and "the right of all such riparian owners to have the stream substantially preserved in its natural size, flow and purity and protected against material diversion."[20] But, as we have noted (*supra*, p. 29),

[20] Weil, *Water Rights in the Western States* (3d ed., 1911), Sec. 117, pp. 137–138, lists Oklahoma as possibly following the "California Doctrine" where appropriation and riparian rights exist side by side, rather than the "Colorado Doctrine" rejecting the common law *in toto*.

the riparian doctrine does not help the Authority since it owns no riparian land. Indeed, the running of the water through the Government's turbines—which does not involve consumption or diversion—would not injure anyone under the definition of riparian rights (quoted above) adopted by the Oklahoma court. See, also, *supra*, p. 31; *infra*, pp. 41–42.

2. In answer to our argument that the State's asserted title must stem from the Federal Government, the Authority seems to say that Oklahoma is not a "public lands state" (Br. in Opp., p. 5), and therefore that it is incorrect to seek to trace all titles to the Federal Government. But in the sense of a listing of the western public domain States which follow to some degree the prior appropriation doctrine, Oklahoma plainly is one of those States. See, *e.g.*, Weil, *Water Rights in the Western States* (3d ed., 1911), Sec. 66, p. 66. Of course, all lands in that State were no more subject to sale under the narrower definition of "public lands" used in the federal disposal statutes than were all the lands in the other western States in each of which lands were reserved in great quantities for Indian and military reservations and other purposes. *E.g.*, *Federal Power Commission* v. *Oregon*, 349 U.S. 435, *supra*. But it is enough that title to all real property in Oklahoma must in some manner be traced to a federal grant. Actually, almost the entire area of what is now Oklahoma was an Indian reservation which was gradually reduced over the years. See the thumbnail outline of this history in Okla. Stat. Ann. (1952), Constitution, pp. XIII–XXX. Lands which

were relinquished by the Indians under treaties or agreements were patented as public lands. For the purposes of determining the rights of the Federal Government (*vis-à-vis* the State) to unappropriated waters, the important factor is whether the lands were federal, not whether they were technically "public" lands rather than federal non-"public" lands; the Authority creates an artificial meaning of no present relevance in insisting that lands in the Indian Territory never were "public" lands (Br. in Opp., p. 5). The critical element is the federal character of the property within the State before it became a State. It is on the basis of that postulate that the respondent must somehow show a grant from the Federal Government.

3. Respondent seeks to solve this problem by claiming that the common law of riparian rights applied in Indian Territory (Br. in Opp., p. 5)—so that (in respondent's view) the Federal Government was the proprietor of water rights in that Territory only as riparian owner [21] but that "upon statehood, the Arid States Doctrine was placed in force in that part of Oklahoma which was formerly Indian Territory" (Br. in Opp., p. 6), with the claimed result that the riparian rights of the Federal Government were instantaneously divested and somehow fell into the waiting hands of the State. This curious hybrid hypothesis has no validity.

(*a*). In the first place, there is no ground whatever for asserting that, by fiat, a shift was made at the

[21] Under this theory, the United States would be the owner of the rights to use waters of the Grand River which run through Indian Territory, and the State of Oklahoma would have no title.

moment of statehood from one doctrine of water rights to the other. Respondent cites no authority and no reason for its unsupported statement that there was an automatic change-over. Certainly, California, which has been struggling with the problem of reconciling the two doctrines for about a century, would be glad to have such a simple solution. Oklahoma's problem in this connection is well stated in *Appropriator vs. Riparian, A Preliminary Examination,* 10 Okla. L.R. (1957) 416, 419:

> Suppose at the birth of a body politic, the Goddess of Discord decreed that the infant state adopt both the riparian and appropriation techniques of acquiring water rights. Suppose further that the state did so but failed to provide how the two systems should be meshed together. This is not the posing of an academic problem. It is a description of Oklahoma's situation.[22]

(*b*). The Authority's next hurdle, even if it had shown that only the appropriation doctrine now applied in Oklahoma, would be to establish State title to

[22] Especially applicable to the Indian Territory is the statement, *id.*, pp. 420–421: "It is interesting to speculate as to the significance of the fact that titles in eastern Oklahoma can be said to have their inception from the date of the treaties with Five Civilized Tribes. All of these antedate discovery of gold in California and hence the development of the doctrine of appropriation, much more the date of recognition of the principle by the federal government. There are, no doubt, other factors stemming from Indian titles which would present equally interesting problems should Oklahoma attempt to follow a pattern similar to the California solution. Perhaps the peculiar origin of some of our titles will effect any attempted solution." And compare *Winters* v. *United States*, *supra*, 207 U.S. 564.

all flowing waters, including unappropriated waters. The State of Oklahoma cannot, as did Oregon in *Federal Power Commission* v. *Oregon,* 349 U.S. at 455, *supra,* rely upon the Desert Land Act, because that Act does not apply to Oklahoma. The 1866 Act, quoted in the *Gerlach* case, *supra,* p. 37, clearly does not help Oklahoma's claim to unappropriated water. It only applied when "by priority of possession, rights * * * to the use of water * * * have vested and accrued * * *", and its effect, as stated in the *Gerlach* opinion, was to make "good appropriations in being as against a later patent to riparian parcels of the public domain, and remove[d] the cloud cast by adverse federal claims." 339 U.S. 725, 748. There is nothing in this statute indicating a grant to any State of all the water flowing within it. The Act dealt only with an appropriation achieved by applying the water to beneficial use. It did not deal at all with waters not so appropriated.

For similar reasons, the Authority cannot rely on another of its bases for asserting that the Federal Government no longer has ownership of the water rights involved here. Respondent has said (Br. in Opp., p. 6): "Before the Indian Territory was admitted into the Union, the United States had released its right to control the waters of non-navigable streams in the Indian Territory for the development of electric power and energy and other purposes." Section 25 of an Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and other purposes, April 26, 1906, 34 Stat. 137, is quoted, and respondent asserts (Br. in

Opp., p. 6) that under this Act "when the Indian Territory was admitted as a state, all of the water rights in non-navigable streams were placed under the control of the State of Oklahoma."

The full text of this statute (Appendix, *infra*, pp. 47–49) raises a grave question whether water rights were intended to be dealt with at all, except possibly to the extent that there might be interference with riparian rights held by or for the Indians. In any event, this statute is a far cry from legislation like the 1866 Act, *supra*, p. 43, in which Congress expressed the specific consent of the United States to the appropriation doctrine as applied to certain designated circumstances. Moreover, the 1906 Act would be, at most, a grant of rights to "any light or power company." It is not a grant of anything to the State of Oklahoma or the Authority. If there were any ambiguous language which might possibly be stretched into a grant of all waters to the State of Oklahoma, such a construction would be precluded by the principle that all federal grants are construed in favor of the Government so as to transfer only what is expressly stated (*United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 116), as well as the principle that general statutes are construed against the relinquishment of existing rights of the Indians (*United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 354). Above all, the respondent Authority, as seems frequently to be true in this field, confuses "title" with "regulation", when it speaks of the United States as releasing by this statute its right to *control* the waters (Br. in Opp., p. 6). The Federal Government had full power, as

sovereign, to regulate all the waters of the Indian Territory—before Oklahoma became a State—and that is the authority it was exercising in the 1906 Act on which respondent relies. There was no grant of *proprietary* rights which could fall to the State when Oklahoma thereafter entered the union.[23]

4. There remains for comment the Authority's assertion (Br. in Opp., pp. 5, 6–7) that there were no unappropriated waters in the Grand River at the time of passage of the Flood Control Act of 1941. This contention is based on the Oklahoma Water Code and a declaration of a State District Court that the Water Code "is a legislative appropriation." Regardless of labels, there has not, in fact, been a beneficial use of the water at the Fort Gibson site by the State or its agency. There has been no appropriation in the

[23] Respondent erroneously relies on *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, and *Rank* v. *Krug*, 90 F. Supp. 773 (S.D. Calif.), as indicating the subordination of federal law to state law in this field of water law. In *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, this Court held that the California Supreme Court was wrong in thinking that the federal statutes, especially Section 8 of the Reclamation Act, had subordinated federal interests to state water law. The Supreme Court of California recognized this error in its decision upon remand of the *Ivanhoe* and related cases. *Ivanhoe Irrigation District* v. *All Parties and Persons*, 53 A. C. 696, 710–712. We believe that the two decisions in *Ivanhoe* make plain the error of the district court in *Rank* v. *Krug* and that this will appear on the appeals now pending in the *Rank* case. The opinion in *United States* v. *Twin City Power Co.*, 350 U.S. 222, 225, classified *Niagara Mohawk* with *Gerlach Live Stock* as cases where Congress had elected to recognize particular State-created rights, exercising "less than its constitutional power."

normal sense. And certainly the State cannot, by a boot-strap process of declaring a "legislative appropriation", create greater rights in its agency than it itself possesses. In this respect the Grand River situation would seem to be no different than those instances, like that in California, where the States have declared, *ipse dixit*, that all the waters of the state are held in "trust" for its people. Cf. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, see *supra*, pp. 35–36. Such "legislative appropriations" do not constitute the beneficial use which the appropriation doctrine requires in order to establish ownership. Failing proof of such ownership, the Authority has not established a case for the taking of its title to the water flowing through or over the Government's dam and power facilities.

CONCLUSION

For the foregoing reasons, it is submitted that the decision below should be reversed with directions to dismiss the petition filed in the Court of Claims.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

APRIL 1960.

APPENDIX

Section 25 of the Act of April 26, 1906, 34 Stat. 137, 146, provides as follows:

> That any light, or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any nonnavigable stream within the limits of said Indian Territory, for the purpose of obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and heat and to utilize and transmit and distribute such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory.
>
> That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any land held by

any Indian tribe or nation, person, individual, corporation, or municipality in said Indian Territory, or in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this Act: *Provided*, That the purchase from and agreements with individual Indians, where the right of alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior.

In case of the failure of any light, or power company to make amicable settlement with any individual owner, occupant, allottee, tribe, nation, corporation, or municipality for any lands or improvements sought to be condemned or appropriated under this Act all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, nation, corporation, or municipality by reason of the appropriation and condemnation of said lands and improvements shall be determined as provided in sections fifteen and seventeen of an Act of Congress entitled "An Act to grant a right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Public Numbered Twenty-six), and all such proceedings hereunder shall conform to said sections, except that sections three and four of said Act shall have no application, and except that hereafter the plats required to be filed by said Act shall be filed with the Secretary of the Interior and with the Commissioner to the Five Civilized Tribes, and where the words "Principal Chief or Governor" of any tribe or nation occur in said Act,

for the purpose of this Act there is inserted the words Commissioner to the Five Civilized Tribes. Whenever any such dam or dams, canals, reservoirs and auxiliary steam works, pole lines and conduits are to be constructed within the limits of any incorporated city or town in the Indian Territory, the municipal authorities of such city or town shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such cities and towns: *Provided*, That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated.

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